COURT OF APPEALS, DIVISION II

NO. 44075-0-II

FROM CLALLAM COUNTY SUPERIOR COURT

NO. 08-00340-9

STATE OF WASHINGTON,

Respondent,

vs.

COREAN BARNES

Appellant.

AMENDED BRIEF OF RESPONDENT

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ISSUE THREE

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COUNTER APPEAL

When the defendant took C.R. into another person's house to have forced sex with her, should his offender score reflect the burglary as a crime that should not merge.

STATEMENT OF THE CASE

On July 6, 2011, the State and Mr. Barnes met to redact a surreptitious audio recording made by the victim, C.R. (RP 39). The parties and the trial court worked from a typed copy of the recording (RP 39). The parties agreed that compliance with the Court of Appeals' order required reading the transcribed recording line by line to determine the admissible portions of the recording (RP 39). The trial court ruled that the tape should start with "what are you doing" on page 2 (RP 48). The trial court admitted all of pages 2, 3, 4, and 5, ending with "no I don't want to go in there," on page 6 (RP 48). The trial court changed the characteristic of the sounds from "struggling" to "scratchy" in the first part of the redaction (RP 48)[1]. The admitted portion of the recording began again on page 7 with the sound of laughing (RP 49). The court held that page 8 was admissible but deleted the words "struggling." (RP 49). On page 9, the court eliminated five lines at the top after "well,

[1] A transcript of the admissible portion of the tape was provided to the jury; characterization of the sounds in the transcript was necessary.

then let me go" and ended the redaction before "I just don't – I just don't want to any more" (RP 49). After five lines about smoking a cigarette, the court excised the three line's referencing another person (RP 50). The transcript began again with the reference to smoking and texting. The court admitted "You hurt my wrist" as a *res gestae* comment (RP 50). The first seven lines of page 10 were admitted, ending at "if you do that, you're getting out." The remainder of the page was redacted (RP 51). The court eliminated pages 11 and 12 (RP 53, 54) and the first nine lines of page 13 (RP 54), until "No I just don't want to do that anymore" to "it's not going to end until I say so," which the court termed a threat (RP 56). Pages 14 through 21 were removed (RP 56-66). Page 22 was redacted until "You know what. I'm going to f*** you now." (RP 66). Redaction began again with the final line of page 22 through page 35 (RP 66-70). The court admitted the bottom five lines from page 37 ("No. I don't want to do that. I don't want you to") to the end of page 39. Page 40 was removed, down to the final four lines,

which Barnes asked to leave in the transcript, beginning with "Oh come on, leave me. I'm crazy." (RP 76). All of pages 40, 41 and the top portion of 42 were admitted as a threat, ending with "I will not do that consensually" (RP 79). The court redacted the remainder of page 42 and all of page 43(RP 79, 81). Page 44 was redacted to the line "____ my dick in there, one last time." The court admitted all of page 45, 46, and the portion of page 47 through "Hm. Like I said, revenge is best served cold" and the victim's response "Yeah" (RP 84). The court removed the remainder of page 47, and pages 48, 49, and 50 (RP 84, 87-88). The court admitted page 51 at "No. I'm just letting you know what I am capable of doing" through "Relax baby, all right. Relax." on page 52 (RP 91). Pages 53 through 64 were redacted (RP 92-4). The court listened to the actual recording before ruling on pages 65 through 67 (RP 98). The State did not seek to admit any further portion of the recording (RP 98).

On July 14, 2011, the trial court issued a memorandum

opinion that addressed both why some parts of the tape were admissible and whether pages 65 through the first three lines of page 67 are admissible. See Appendix A.

The trial court's memorandum opinion focused on subsection 2 (b) of the Washington State Privacy Act, RCW 9.73.030: communications "which convey threats of extortion, blackmail, bodily harm, or other unlawful request or [sic] or demands. ..." Opinion, page 1. The trial court limited the definition of "threats" to statements containing "extortion" or "blackmail." Opinion, page 2. The trial court determined that many of the threats made by Mr. Barnes fall within the extortion category: "have sex with me one more time or I will not leave you alone." The trial court also characterized these comments as "unlawful requests or demands." Opinion, page 2.

Addressing pages 65 through 67, the trial court held the language during that time showed the victim was resisting Mr. Barnes, who was insisting on having sexual relations with her. The trial court found this portion of the tape was admissible as

an exception to the Privacy Act as an "unlawful request or demand." Opinion, pages 2, 3. The final transcript of the redacted recording is attached as Appendix B.

The trial began with the testimony of the victim, C.R. (RP 199). She testified she had had a dating relationship with the defendant off and on beginning in 2007, 2008 (RP 199). On August 13, 2008, she agreed to give the defendant a ride on two separate days, rather than allow him to drive her vehicle (RP 200). During the drive, she became upset with him because he was not being very friendly toward her (RP 202). She thought about ditching him when they stopped, but he threatened to blow up her house and her car if she left him there (RP 202). She took the threat serious because he had threatened in the past to kill two other women (RP 203).

After dropping him off in Sequim, WA, she decided she did not want any further contact with him, but she had agreed to give him a ride on August 15, 2008 (RP 204). When he exited her car, she told him she would still give him another ride but

that she did not want to have any further relations with him (RP 204). He responded that he agreed the relationship was over (RP 204).

As a precaution prior to the second trip, she purchased a digital tape recorder, to have a record of anything that happened during the trip (RP 205). She picked him up at a friend's house in Sequim (RP 209). When she drove up and rolled down her window, he approached her car, leaned his torso through the window and began touching her breast under her shirt and then put his hand down her pants (RP 210). She told him to stop and that she did not want to do that anymore but he did not listen to her (RP 210). She had difficulty resisting because she was still belted in, but her belt came loose or was removed and he began pulling her out of her car by her wrists (RP 210). He began dragging or carrying her to a camper and then closed both of them into the camper (RP 211). She was unable to turn around to face the door and he put his hand down her pants and penetrated her vagina (RP 212). She was finally able to turn

around and open the door and escape as he tried to push her back into the camper (RP 212). He stopped when his cell phone began to ring (RP 212).

She went to her driver's seat and he sat in the passenger seat, talking on the cell phone and smoking a cigarette (RP 213). She was uncomfortable but they started driving to Port Townsend (RP 213). He began to make comments about touching her in her crotch as she drove and she told him it would not be okay for him to do that (RP 216-7). He then told her he wanted to have sex one last time before ending the relationship (RP 217). When she told him she did not want to have any further sexual relations with him, he warned her he would not take "no" for an answer (RP 217). She felt very uncomfortable (RP 217).

When they arrived in Port Townsend, she dropped him off and then tried to collect her thoughts. She felt trapped because she was afraid about how he would react if she just left him in Port Townsend (RP 218). She attempted to contact the

police but the police station was closed and there was no number on the building (RP 219). She did not call 911 because she was afraid of making a scene (RP 220). Instead, she bought a container of pepper spray (RP 220).

When he got back in the vehicle, he again began talking about having sex with her. She told him she did not want to do that anymore; that she was not comfortable with it (RP 220). He then said that if they did not have sex one last time he was going to be in her life forever, bothering her. She responded that it would be harassment. He told her that there was no way to prove what he was saying and that if she told anyone or tried to get a restraining order, he would sue her for slander. He then told her he loved her enough to kill her (RP 221). He then threatened to kill her cat and skin it. All of the conversation made her very uncomfortable and very threatened (RP 222).

She drove him to Tiny Johnson's house (RP 224). She sat on the couch (RP 225). She and the defendant began to kiss but she decided she did not want any more of that and began to pull

away (RP 226). The next thing she remembered is that he was carrying her to the bedroom and she could not get her legs down (RP 226). He was trying to pull her pants down; she attempted to keep them up but he kept pushing her into the wall (RP 227-8). She was telling him she did not want "to do this" (RP 228). He eventually penetrated her vagina with his penis and she believes he ejaculated (RP 229). After she recovered from an asthma attack, she drove him to Sequim (RP 229-230). When he exited her car, he said something to the effect "now you're not going to make any trouble for me are you" (RP 230, 234). She did not know what to do next because she did not think the forced sex was violent enough to be rape, so she called her nurse practitioner and, eventually, reported the rape to the police (RP 235).

After cross-examination, the redacted tape was played for the jury (RP 270).

Kenneth (Tiny) Johnson testified that he had permitted Mr. Barnes to stay at his house in early July 2008 (RP 305).

Mr. Barnes paid $200 for the first month, but, when he could not pay for the second month, Mr. Barnes chose to move out, apparently at the end of July 2008 (RP 306) or first part of August 2008 (RP 310-311). When he left, he could not take all his possessions; Mr. Johnson permitted Mr. Barnes to come back into Mr. Johnson's home to obtain his possessions. Mr. Barnes was told he could enter only after contacting Mr. Johnson and waiting until he was home (RP 307). Mr. Barnes was not allowed in the home when Mr. Johnson was not present (RP 307). On cross, Mr. Johnson testified that he had encountered Mr. Barnes in his home on August 19, 2008 (RP 313). He was not happy that Mr. Barnes was in his home without notice and without his presence (RP 316). Mr. Johnson did not give Mr. Barnes permission to be in his home on August 15, 2008 (RP 316).

The jury found Mr. Barnes guilty of two counts of rape in the second degree, burglary in the first degree (with sexual motivation), and unlawful imprisonment (RP 553-4).

Mr. Barnes was sentenced on October 16, 2012 (RP 559). The State argued that the conviction for first degree burglary should be counted separately from the second rape conviction because it involved a different victim (Mr. Johnson) (RP 562). The trial court held that the burglary conviction merged with the rape conviction under RCW 9.94A.589 because the two crimes required the same criminal intent, occurred at the same time, and C.R. was the victim, not Mr. Johnson (RP 563). After sentencing, this appeal followed.

ARGUMENT

ISSUE

Did the trial court err when it admitted into evidence a secretly recorded conversation that was replete with threats which the trial court designated as extortion and unlawful requests or demands, both exceptions to the Privacy Act?

RESPONSE

The trial court correctly determined that some portions of the recorded conversations were exceptions to the Privacy Act.

Standard of Review: Interpretation of a statute is a question of law reviewed *de novo*. *State v. Christensen*, 153 Wn.2d 186,

194, 102 P.3d 789 (2004). The trial court's ultimate decision to admit or exclude evidence is reviewed for an abuse of discretion. *State v. DeVincentis*, 150 Wn.2d 11, 17, 74 P.3d 119 (2003). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). The party challenging an evidentiary ruling bears the burden of proving the trial court abused its discretion. *State v. Williams,* 137 Wn.App. 736, 743, 154 P.3d 322 (2007).

ANALYSIS

Washington's Privacy Act provides, in relevant part:

> (1) Except as otherwise provided in this chapter, it shall be unlawful for any individual, partnership, corporation, association, or the state of Washington, its agencies, and political subdivisions to intercept, or record any:
> ...
>
> b. Private conversation, by any device electronic or otherwise designed to record or transmit such conversation regardless how the device is powered or actuated without first obtaining the consent of all the persons engaged in the

conversation.

The State concedes the recording included conversations that were "private" while not conceding that all of the recording related to conveying a conversation. *State v. Christensen, supra* at 192, 102 P.3d 789 (Privacy Act protects telephone conversations). But, some of the recorded information clearly falls into the act's exception: RCW 9.73.030(2) provides exceptions to the consent requirement:

> Notwithstanding subsection (1) of this section, wire communications or conversations (a) of an emergency nature, such as the reporting of a fire, medical emergency, crime, or disaster, or (b) *which convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands*, ... may be recorded with the consent of one party to the conversation.

Clearly, Mr. Barnes took umbrage at C.R.'s attempt to break off their relationship on her terms and conveyed on many occasions during the taped conversation the intent to cause bodily injury to C.R. (force her to have sex one more time or kill her if she would not consent) or physical damage to the property of C.R.

(to kill and skin her cat). Many of the comments were clearly extortion: either have sex with me or (1) I will never leave you alone or (2) I will kill you, any other lover or your cat. Mr. Barnes admitted the two explicit threats were admissible. The trial court, however, correctly analyzed whether other portions of the recording were admissible as an exception to the Privacy Act. Each of the admitted portions of the recording was analyzed correctly:

The first admitted portion of the recording at page 1 of the transcript related to Mr. Barnes' attempt to sexually assault C.R. in her vehicle. The recording clearly shows she is telling him not to assault her – cause her bodily harm – and he is simply not going to stop. By the middle of page 5, he is dragging C.R. to the camper and she is protesting loudly ("I don't want to go in there.)" "CB: "I want you to stop [resisting]." CR: "I don't want to stop [struggling]."") Mr. Barnes tells C.R. that she is going to go into the camper. C.R. is crying and he is "asking her" to go into the camper so he can show her something. Then, the sound

of struggling in which he is ordering her to "turn around. Turn around. Turn around" on page 7. Mr. Barnes had no right to touch her vagina in the car or drag her to the camper and his demands were an unlawful request or demand.

The second admitted portion of the recording on page 8 ("You hurt my wrist") supports the first admitted portion, showing Mr. Barnes' use of force caused injury to C.R. It is a *res gestae* statement, supportin the bodily injury he caused her by dragging her by her wrists.

Defense counsel was not ineffective because he did not challenge admission of "You hurt my wrists" when the trial court held it was a res gestae statement.

Mr. Barnes asserts that defense counsel was ineffective because he did not challenge this ruling under ER 401, 402 and 403.

Standard of Review: To establish ineffective assistance, a defendant must show that counsel's conduct was deficient and that the deficient performance resulted in prejudice. *State v. Nichols,* 161 Wn.2d 1, 162 P.3d 1122 (2007). Counsel's failure

to anticipate changes in the law does not constitute deficient performance, even if counsel has an obligation to research relevant topics facing his client. *State v. Brown,* 159 Wn.2d 366, 245 P.3d 776 (2011).

Mr. Barnes cited to *State v. Grier,* 168 Wn.App. 635, 278 P.3d 225 (2012), which was published June 7, 2012, three months before his second trial began. Counsel's failure to conduct research into current decisions is apparently the basis for the ineffective assistance claim.

The *Grier* decision departed from other Washington decisions about the court-created *res gestae* exception because it conflicts (conflates) with ER 404 (b). The case involved admission of evidence that was not relevant to the issue before the trier of fact. The question then is whether the *Grier* decision applies to the facts of this case. It does not; the statement the trial court termed *res gestae* in this case was not a substitute for ER 404 (b) analysis. The trial court's decision, although it termed "You hurt my wrist" as *res gestae,* also stated the

comment was relevant to show the injury Mr. Barnes caused when he dragged her by the wrists. The evidence is relevant to show the pain that Mr. Barnes caused C.R. The trial court's characteristic therefore meets the definition of relevant evidence in ER 401 and is admissible under ER 402. There is no error in admitting the comment and certainly there is no ineffective assistance of counsel. In any event, failure to cite to ER 401, 402, or 403 was harmless. That one small section of the transcript and recording, perhaps three seconds or four seconds, would have no impact in light of the rest of the recordings.

All trial court decisions about admissibility after this point are also admissible as an exception to the Privacy Act or because the Privacy Act does not apply to them.

The recording continues with his threat to have sexual contact or intercourse while she drives ("I'm going to finger your pussy while you're driving", page 8). That is a threat to cause bodily injury.

The third admitted portion of the recording on page 8 ("It's not going to end until I say so") is part of the Mr. Barnes'

extortion threats and continues into the language on page where he stated "I'm not taking no for an answer..." This is part of the extortion theme and also is a threat to cause bodily harm. The theme continues in the next portion of the admitted recording on page 11, where Mr. Barnes warns her he is going to f--- her one more time, he is not going to take no for an answer, and either she complies or he will be in her life forever. When C.R. tells him his threats are harassment (page 13), he ignores her and tells her she will not be able to prove it it. On page 14, C.R. threatens to crash her vehicle to get away from him so "at least I won't have to have sex with you." Mr. Barnes responded "Oh you still have to have sex with me. Either that or... C.R. asks Mr. Barnes if he is threatening her. His response on page 15 is "Well you are gonna have sex with me. I ain't asking you, I'm telling you. You want to be done with me, that's that's that's the agreement. Then you are out." He continued on page 15 with "And I guarantee you I'm doing it." These statements fits a number of categories: It conveys a threat of extortion, threatens bodily

harm, and makes an unlawful request or demand.

When C.R. indicated on page 16 that she had a right to say no, he warned her that if she "goes to the cops" he will "know about it." If she tries to get a "harassment order" (page 16) he will ignore it because it's just "a piece of paper." He then threatened to sue her for defamation if she said anything, touting the skills of his private attorney and telling her she is like a "beaten dog." His final degrading threat is "revenge is best served cold (page 17). On page 18, he continued with "I'm just letting you know what I am capable of doing."

On page 18, Mr. Barnes stated "If I can't have you, nobody can" and then "I love you enough to kill you." When asked if he was making a threat, he stated "I love you enough to kill you. If I can't have you nobody can. If I find out you talked to somebody that mother--- is dead." Then, Mr. Barnes threatened to kill and skin her cat if she does not agree to have sex with him one last time ("I might have to kill your cat, just for fun. Don't have to skin him"). Mr. Barnes admits on appeal

that these are explicit threats to kill C.R. or her cat.

The final section the trial court ruled on in its written opinion as an exemption begins on page 19. It is mostly the victim repeating the word "stop...stop...stop..." over and over again with Mr. Barnes acting as if he does not have a clue that she does not want to have sex with him. The trial court opined that this final portion showed that Mr. Barnes was insisting on having sexual relations with C.R. and she was resisting both verbally and physically. The trial court held the communication would fall within the exception of the statute that covers "unusual requests or demands." The trial court correctly analyzed this portion of the recording; the court's analysis also supports all of the other portions of the recording in which the victim was trying to get Mr. Barnes to stop and Mr. Barnes was forcing himself on her.

As the trial court also noted, a significant portion of the recording was what the court termed "nonverbal communication" ("stop" or "I don't want to"). The State

understands the trial court's analysis (e.g., a mother can silence her child with just a glance in most cases), but it does not accept that much of the recording is protected by the Privacy Act. First, the act protects "communication" that "conveys" something. When there is neither communication nor something being conveyed, the act does not apply. Second, it does not fit because it merely reflects the sounds of a rape in progress. It is background noise.

There is no question the Privacy Act is intended to protect all *conversations* or *communications* however they are *conveyed.* The final recorded segment at page 65, as with other places where she is pleading with him to stop certainly does not contain a conversation. The sound of a person begging the rapist to stop is not a conversation. Nor is it communication. The Oxford English Online Dictionary defines "communication" as "imparting or exchanging of information or news." Even interpreting the Privacy Act most stringently, this portion of the redacted tape does not merit protection.

The State's position is supported by the language of the Privacy Act, itself. RCW 9.73.010, the first Privacy Act, dealt with "wrongfully obtain[ing] or attempt[ing] to obtain, any knowledge of a telegraphic message,..." A telegraphic message conveys information; it is a communication. The statute' clear language protects a document that includes information, is sent as a communication, and conveys the information it includes. The later addition to the act, RCW 9.73.030, makes it illegal to intercept or record "Private communication transmitted by telephone, telegraph, radio, or other device..." without two-party consent. The language obviously modernizes and extends RCW 9.73.010 beyond telegrams to other devices not in existence in 1881. The statute's language does not mean that all recordings are protected from disclosure.

RCW 9.73.040 begins a series of exceptions that permit law enforcement to intercept private communications with drug dealers or other criminals. Inmates are not protected from recording or divulging telephone calls or other "monitored

nontelephonic conversations..." RCW 9.73.095. In other words, what one inmate says to another can be recorded and divulged. Somewhat intriguingly, RCW 9.73.110 permits building owners to record and divulge conversations or communications if the person is engaged in a criminal act at the time of such communication, yet C.R. may be civil and criminally liable for taping the sounds of her rape. However, the State does not believe the Privacy Act applies to background crime sounds and the act's language supports the State.

Even if the Privacy Act applied to some of the recording, background sounds are clearly exempted. In *State v. Smith*, 85 Wn.2d 840, 540 P.2d 424 (1975), the Washington Supreme Court held that a secret recording capturing the events surrounding a murder was admissible evidence. In *Smith* the defendant was a Seattle police detective charged with homicide. 85 Wn.2d at 842. The defendant had previously arrested the victim. *Id.* The victim agreed to meet an unidentified caller regarding a case against him. *Id.* Prior to his meeting, the victim

purchased a small tape recorder that he concealed the recorder under his clothing. *Id.* The victim was shot and killed when then met the unidentified caller. *Id.* A recording of the incident was discovered during an autopsy in the medical examiner's office. *Smith*, 85 Wn.2d at 843.

> The tape begins with remarks by [the victim], introducing [his neighbor who waited for the victim nearby] and stating his destination. The two men discuss the walkie-talkies and other arrangements, and [the victim] starts toward the designated alley. As he walks he narrates, describing the scene around him and describing with particular care each person in the vicinity. Remarking, 'Everything looks quite normal,' he says he is turning into the upper part of the alley. Then, suddenly are heard the sounds of running footsteps and shouting, the words 'Hey!' and 'Hold it!' [The victim] saying [the defendant's name], and a sound resembling a gunshot. The running stops, and [the defendant] tells [the victim] to turn around. [The victim] asks 'What's the deal?' [The defendant] replies, 'You know what the deal is. I'll tell you one thing baby, you have had it.'
>
> Several more words are exchanged, not all of which are clearly intelligible, about whether [the defendant] has 'a charge.' Then [the victim] asks, 'If you wanted me, why didn't you come to see me?' [The defendant] replies, 'I'll tell you why.' A moment later, another shot is heard. The quality of the recoding becomes 'tinny.' ... then [the victim], screaming, repeatedly begs for his life. More shots are fired. There is a slight pause, two more shots are

> heard, then certain [unclear] sounds, then silence. After a period of nearly complete silence, a voice is heard to say, 'We've already called the police.' Another voice says, 'Hey, I think this guy's dead, man." Afterward, the tape records police sirens and the sounds of the officer investigation.

Id. at 844-45. The Supreme Court affirmed that the tape was admissible under RCW 9.73 and reasoned that "[g]unfire, running shouting, and [the victim's] screams do not constitute 'conversation' within that term's ordinary connotation of oral exchange, discourse, or discussion." *Id.* at 846.

In this case, there are numerous sounds and statements that do not constitute an oral exchange of sentiments, observations, opinions, or ideas. The recording captures sounds of two sexual assaults at the beginning and end of the road trip (as well as during the car ride). During these events, C.R. is overheard stating "no," "I don't want you to do this," crying, gasping, whimpering, and struggling against Mr. Barnes. This Court should hold that the real time recordings of the sexual assaults are admissible.

Any error in admitting more recording than permitted under the Privacy Act was harmless.

Harmless error analysis applies because "[f]ailure to suppress evidence obtained in violation of the act is prejudicial unless, within reasonable probability, the erroneous admission of evidence did not materially affect the outcome of the trial." *State v. Christensen* at page 200, 102 P.3d 789.

Mr. Barnes complains that the trial court admitted too much. Every section of the recording implicitly or explicitly conveyed a threat to extort or cause bodily injury to C.R. If the trial court erred ever so slightly when it admitted a little more of the conversation than the actual threat, the error is harmless. First, the error is harmless because the relevant admissible portions overwhelmingly showed that Mr. Barnes was going to have sex with C.R. or kill her (or, at least, harass her). Second, C.R. testified at length about everything that was on the recording. Viewed in a light most favorable to the State, the evidence was clearly enough to show she was penetrated against

her will at the camper, penetrated against her will at Mr. Johnson's residence, and held at the Mr. Johnson's residence for the purpose of sexual assault.

Mr. Barnes alleges the trial court incorrectly applied the "hostage holder" exception to the recording. The State cannot find any such ruling. In any event, this deputy of the State does not believe the "hostage holder" exception applies to these facts. The statute permits *law enforcement* to record communications with a hostage holder. Even though the jury found that Mr. Barnes unlawfully imprisoned C.R., the recording was not made during a hostage situation.

ISSUE TWO

When the facts of the case show that the victim was dragged from her car to a camper and penetrated and then dragged from a couch to a bed, screaming all the time that she did not want to have sex with Mr. Barnes, did the trial court err when it refused to give an instruction about third degree rape.

There is simply nothing in the record that would support an instruction for third degree rape, i.e., that C.R. simply did not consent to sexual intercourse.

Standard of Review: A defendant is entitled to a jury instruction

on his or her theory of the case if the request is supported by substantial evidence. *State v. Walters,* 162 Wn.App. 64, 255 P.3d 855 (2011).

Mr. Barnes contends he was entitled to a third degree rape instruction because the evidence may have shown that C.R. just expressed a desire not to have sex. This assertion clearly overlooks the testimony establishing that C.R. was carried or dragged forcibly toward the camper and the bedroom. That she was screaming "stop...stop...stop..." has to be seen more than as refusing to consent under these facts.

Mr. Barnes presented nothing that would show she simply did not consent. His defense was that no sexual assault occurred at the camper (RP 353, 361, 364). He contended they had consensual sex in the bedroom (RP 374-75) and that he stopped when she said she was uncomfortable (RP 376). Nothing in his testimony or in any other part of the record showed that sexual intercourse occurred without her consent. Mr. Barnes sexually assaulted C.R. on two occasions, using

extreme force the second time to complete what he could not complete at the camper. The trial court had no basis upon which to instruct the jury on third degree rape.

The trial court's refusal to provide a third degree rape instruction is supported by RCW 9A.44.010 (7). It is true that C.R. agreed to enter Mr. Johnson's house and did begin kissing Mr. Barnes. However, both the recording and C.R.'s testimony show that she did not consent "at the time of the act of sexual intercourse" and there are *no* actual words or conduct indicating freely given consent. That Mr. Barnes carried her from the couch over her continuous objection and then raped her in another room before *finally* understanding that she did not want to have sexual intercourse is easily supported by his threats to have sex with her "one last time."

ISSUE THREE

When the only evidence in the record is that Mr. Barnes had established a new residence in the camper and that he had been told not to return to the old residence of Mr. Johnson without Mr. Johnson's permission and presence, is the record sufficient to show that Mr. Barnes entered or remained unlawfully in Mr.

Johnson's house on August 15, 2008?

ANALYSIS

Viewing the evidence in a light most favorable to the State, the evidence is more than sufficient to support the conviction for burglary in the first degree.

Standard of Review: Evidence is sufficient to support a conviction if, viewed in the light most favorable to the jury's verdict, it permits any rational trier of fact to find the essential elements of the crime beyond a reasonable doubt. *State v. Notaro,* 161 Wn.App. 654, 670-71, 255 P.3d 774 (2011). A claim of insufficiency admits the truth of the State's evidence and all reasonable inferences that a trier of fact can draw from the evidence. *Id.* All reasonable inferences from the evidence must be drawn in favor of the verdict and interpreted strongly against the defendant. *Id.*

Mr. Barnes contends there was no evidence of unlawful entry into Mr. Johnson's residence. Mr. Johnson testified that Mr. Barnes left at the end of July or early part of August 2008. After he moved out, he had permission to enter or remain upon

two conditions: First, that he have permission from Mr. Johnson; second, that Mr. Johnson be home when Mr. Barnes came over. Mr. Johnson testified that Mr. Barnes did not have permission to be in his home on August 15, 2008. Mr. Barnes cited to *State v. Wilson,* 136 Wn.App. **596,** 150 P.3d 144 (2007), but the decision actually supports the State's case. The Court held at page 609: "It is the consent, or lack of consent, of the residence possessor...that drives the burglary statute's definition of a person who 'is not *then* licensed, invited, or otherwise privileged to so enter or remain' in a building." (emphasis added) Mr. Barnes was not invited or otherwise privileged to enter or remain after early August except upon conditions set by Mr. Johnson. To hold otherwise would mean that simply placing personal possessions in a building creates a legal occupancy. Mr. Barnes' conviction for burglary in the first degree is supported by substantial evidence.

//

//

CROSS APPEAL

When the defendant took C.R. into another person's house to have forced sex with her, should his offender score reflect the burglary as a crime that should not merge.

ANALYSIS

The crimes of burglary in the first degree and rape in the second degree should not merge under these facts because the victim of a burglary is the person who can grant or withhold consent to enter, not C.R.

Standard of Review: A trial court has discretion not to merge a burglary conviction with another crime. *State v. Lessley,* 118 Wn.2d 773, 827 P.2d 996 (1992). A trial court abuses its discretion when it bases its decision on unreasonable or untenable grounds. *State v. Rafay*, 167 Wn.2d 644, 655, 222 P.3d 86 (2009). The party challenging an evidentiary ruling bears the burden of proving the trial court abused its discretion. *State v. Williams,* 137 Wn.App. 736, 743, 154 P.3d 322 (2007). The trial court's refusal to merge is based on untenable grounds because C.R. was not the "same victim" for purposes of merger.

Mr. Barnes was sentenced on October 16, 2012 (RP 559). The

State argued that the conviction for second degree burglary should be counted separately from the second rape conviction because it involved a different victim (Mr. Johnson) (RP 562). The trial court held that the burglary conviction merged with the rape conviction under RCW 9.94A.589 because the two crimes required the same criminal intent, occurred and the same time, and C.R. was the victim, not Mr. Johnson (RP 563).

State v. Lessley, 118 Wn.2d 773, 827 P.2d 996 (1992) addresses this issue. *Lessley* harmonized the antimerger burglary statute, RCW 9A.52.050, with the "same criminal conduct" provision of the Sentencing Reform Act. *Lessley* stated that, even if the burglary occurred in the course of another crime, a trial court had discretion *not* to merge the two convictions for sentencing.

The facts of *Lessly* are different from this case. The Supreme Court held that the "same place and time" element of former RCW 9.94A.400 (1)(a) was not met, affirming the Court of Appeals determination that merger was not appropriate under

those facts. In the present case, however, Mr. Barnes' intended to force C.R. to have sex with him and the rape occurred in the course of the burglary. But, as *State v. Wilson, supra,* held, the person who is capable of giving or withholding consent is the focus of the burglary statute. The victim of the burglary was Mr. Johnson because he was the only person who could give consent to enter or remain in his residence. The trial court erred as a matter of law when it held that the burglary conviction merged with the rape conviction.

The trial court abused its discretion when it entered a sentence that did not reflect the jury's decision that Mr. Barnes committed first degree burglary.

This case presents a very compelling reason why the trial court should exercise its discretion in favor of nonmerger, if there is discretion involved. Mr. Barnes was not convicted of burglary in the first trial. He was given a 119 month sentence. He was convicted of burglary in the second trial. He was still given a 119 month sentence. *Lessley* found this unacceptable at page 781 because it offends the concept of proportionality built

into the Sentence Reform Act. RCW 9.94A.010 (a) indicates the punishment for a crime should be commensurate to the seriousness of the offense. The second jury found the crime of burglary was serious. The trial court did not impose a sentence commensurate with the seriousness of the crime when it imposed the same sentence as it had after the first trial.

CONCLUSION

Mr. Barnes' protestations to the contrary, he is not innocent. The recorded admissible statements show He displayed extreme brutality and a serious lack of empathy to someone who desired to end her relationship with him. The trial court properly analyzed the Privacy Act and determined only limited portions were admissible; each portion supports the victim's testimony from the stand. Evidence supports his conviction and the trial court had no obligation to provide an instruction for third degree rape when neither Mr. Barnes nor the victim presented any evidence that would support it. This Court should remand for resentencing because the trial court

incorrectly merged the burglary and the rape conviction, permitting Mr. Barnes to receive a disproportionate sentence the damage he caused. Otherwise, the State requests the conviction be affirmed.

Respectfully submitted this 6th day of June, 2013.

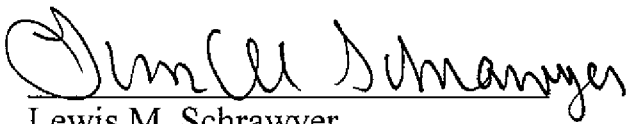
DEBORAH KELLY, Prosecutor

Lewis M. Schrawyer, #12202
Deputy Prosecuting Attorney
Appeals Unit

CERTIFICATE OF DELIVERY

Lewis M. Schrawyer, under penalty of perjury under the laws of the State of Washington, does hereby swear or affirm that a copy of this document was forwarded electronically or mailed to Lise Ellner on June 6, 2013.

DEBORAH KELLY, Prosecutor



Lewis M. Schrawyer

APPENDIX A

SUPERIOR COURT OF WASHINGTON
COUNTY OF CLALLAM

STATE OF WASHINGTON,

Plaintiff,

vs.

COREAN BARNES,

Defendant.

NO. 08-1-00340-9

MEMORANDUM OPINION
ON TRANSCRIPT REDACTIONS

On the 6th of July, 2011, the Court and the parties reviewed the written transcript which contains the transcribed communications of Ms. Christina Russell, and Mr. Corean Barnes. Ms. Russell recorded the communications without the knowledge of Mr. Barnes, thereby implicating Chapter 9.73 the Washington State Privacy Act.

Under that act it is unlawful to record any private communication without first obtaining the consent of all of the participants. Communications which violate the statute may not be used in any criminal prosecutions.

Subsection 2 has exceptions to the prohibition against use in a criminal proceeding. Subsection 2(b) allows private communications recorded without the consent of all parties to be introduced in criminal proceedings if the communications are those "which convey threats of extortion, blackmail, bodily harm, or other unlawful requests of demands . . ."

This matter has been remanded for a retrial following a reversal by Division II of the Court of Appeals. Division II noted that: "A number of Barnes's recorded remarks

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

that went before the jury did not convey threats, either directly or indirectly, and did not fall under the exceptions to the privacy act . . ."

The Court then noted:

> "In light of the narrow construction we afford the threats exception, coupled with the broad definition of 'convey' under Calgari, we hold the trial Court abused its discretion by admitting the entire recording here. Admitting certain statements that otherwise do not fall under one of the Acts exceptions, simply to add context is not proper."

The Appellate Court then noted that the trial Court should conduct a more detailed analysis of the recording before admitting the selected portions that met the threats exception to the privacy act. That was the impetus for the hearing of July 6, 2011.

Certain terms need to be defined. "Threat", as noted in the Court of Appeals opinion, is to be construed narrowly for purposes of the Privacy Act.

RCW 9A.56.110 defines extortion as follows:

> "'Extortion' means knowingly to obtain or attempt to obtain by threat property or services of the owner, and specifically includes sexual favors."

"Blackmail", according to Black's Law Dictionary, Revised Fourth Edition, in common parlance, is synonymous with extortion.

It should be noted that the threats, which are exempted from the Privacy Act prohibitions include threats which are physical (bodily harm) and threats which amount

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Clallam County Superior Court
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Port Angeles, WA 98362-3015

to extortion. Many of the threats made in this case fall within the extortion category. Paraphrasing many of the communications here, the defendant is essentially saying "have sex with me one more time or I will not leave you alone." That seems to fit within the definition of a threat of extortion.

Additionally it is not merely threats which are allowed. Unlawful requests or demands also fall within the exceptions of the Act.

Many of the statements were ruled on of the hearing, a portion was taken under advisement.

Beginning at page 65 there is recording which Ms. Russell purportedly will testify involves a nonconsensual sexual encounter between she and Mr. Barnes. The recording contains words and other sounds. To the extent that that particular part of the recording is a "communication", the question is whether it constitutes a threat, or some unlawful request or demand. Many of the words are "stop" or "I don't want to". Much of the recording might well be described as nonverbal communication. It seems clear to the Court that one interpretation would be that Mr. Barnes was insisting on having sexual relations with Ms. Russell and she was resisting both verbally and nonverbally. Such communication would appear to fall within the exception of the statute that covers "unlawful requests or demands". To the extent the recording shows a demand on the part of Mr. Barnes and actions upon that demand to have sex against the will of Ms. Russell, such demand would be unlawful. That particular part of the recording would be exempt from the prohibitions of the Privacy Act.

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JUDGE
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Port Angeles, WA 98362-3015

It would appear to the Court that beginning at approximately 1 hour and 47 minutes into the CD, and using the transcript from the middle of page 65, through the first three lines of page 67 and to the extent these sounds constitute private communications such would be exempt from the prohibitions of use under the Privacy Act statute.

DATED this 14th day of July, 2011.

Respectfully submitted,

KEN WILLIAMS
JUDGE

KEN WILLIAMS
JUDGE
Clallam County Superior Court
223 East Fourth Street, Suite 8
Port Angeles, WA 98362-3015

APPENDIX B

CLALLAM COUNTY SUPERIOR COURT CLERK

TITLE: STATE VS BARNES

CASE# 08-1-00340-9

PLAINTIFF EXHIBIT NO. 3

Date of Court's Ruling: 9-19-12

X ADMITTED _____ REFUSED

_____ WITHDRAWN _____ NOT OFFERED

ORIGINAL

CLALLAM COUNTY SHERIFF'S DEPARTMENT
CASE REPORT NARRATIVE

COPY

Case Number: 2008-8578

RECORDING

CR: [redacted]
CB: Corean Barnes

CR: What are you doing?

CR: No, I don't want, no.

CB: What happened to your thumb?

CR: What?

CB: What happened to your thumb?

CR: No it's just the nail.

Sounds in background.

CR: What?

CB: You don't like my touch any more?

CR: I don't want to do this any more.

CB: Just one last time?

CR: No.

CB: One last time.

CR: No. I don't want to.

CB: You know when you _ these things what they do to me. You're telling me you don't want to?

CR: No.

CB: *Whispering.*

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CR: No. What is this?

CB: _____

CR: No. No. Stop.

CB: Come here. Come here. Stop being like that.

CR: I don't want to.

CB: Oh my goodness.

Sound of car door open.

CR: Do you want me to give you a ride or not?

CB: Mmmh.

CR: Well then you better be nice and do what I say.

CB: I am being nice.

CR: No. I'm not. I don't want you to do this.

CB: Yes I am.

CR: No. No. No.

CB: Do I need to pick you up out of here?

CR: You better not.

CB: I will.

CR: No.

CB: *Laughing.* Ow. What the hell you doing.

CR: I don't want you to.

CB: How was work?

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CR: Okay.

Scratchy sounds.

CB: Come here.

CR: No.

Struggling sounds.

CR: Stop.

CB: Will you stop acting like, why you acting like that?

CR: I told you, I don't like that. I promised you I'd give you a ride and that's why I came here, so you won't do something crazy.

CB: Mmh. Why would I do something crazy.

CR: Cuz you said so. You're gonna be late.

CB: Uhhuh.

CR: Yeah you are.

CB: _____ It's only like, not even 4:15. Stop.

CR: I told you no. Uh. Quit.

Sounds of struggling; scratchy sounds. Crying.

CR: Uh. Uh. I don't want to. I don't want to do this.

CB: Why not. We always do it.

CR: No.

CB: You don't want me any more? Is that it?

CR: I told you.

Scratchy sounds.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: Is that what you're telling me? You don't feel anything? Feel what I feel? Huh?

CR: No. Tired of you yelling at me.

CB: Oh you got my favorite underwear.

CR: Uh. Uh. Uh. *Crying.*

Sound of struggling. Breathing hard.

CB: Come here.

CR: You know you didn't miss me.

CB: Yes I do.

CR: No. You don't miss me. Stop. Uh. *Gasping.*

Sound of struggle.

CR: _____

CB: No.

CR: I don't want you to do that. No. Uh. Uh. Oh.

CB: No.

CR: Today.

CB: _____

CR: _____ we don't talk. We yell at each other. We have arguments.

CB: _____

CR: Uhhuh.

CB: Mmhuh.

CR: Uhhuh.

CB: Mmhuh. Did you get your hair did today?

CR: No.

CB: It looks like it was changing color or something.

CR: It is.

CB: Oh.

CR: Needs to be dyed. Are you done now?

Gasping and struggling sounds. Voices unintelligible.

CR: Ouch. No. Stop. I don't want you to do that. Uh. Uh. Ow. Ow. Uh. Uh. Stop.

CB: _____ *Laughs.* What am I, _____.

CR: No.

CB: You're not? How about now?

CR: No. I don't want to go in there.

Rustling sounds.

CB: Comer here. Quit running away from me.

CR: I don't want to.

CB: Babe stop.

CR: No, I want you to stop. Stop. No. No. I don't want to. No.

CB: *Laughs.* You're funny. Stop.

Scratchy sounds.

CR: No. Uh. No. Stop. Stop (*Sound of motor in background).* Let me go okay? _____ do this _____. I'm just gonna go.

CB: No you're not.

CR: Yes I am.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: I want to show you something.

CR: I don't want to go in there.

CB: No you're not.

CR: Yes I am. Stop. Stop. No. Uh. Uh.

CB: _____

CR: What?

CB: _____

CR: No.

CB: No, I want to show you.

CR: No, I don't want to go in there.

Rustling sounds. Laughing.

CB: _____ step up.

CR: No I don't want to.

CB: Step up.

?: We gotta go in. I'm just trying to show you.

CR: You're not.

CB: One. Yeah, I am.

CR: No you're not.

CB: Yes I am.

CR: You're not. I don't want to do this any more.

CB: Would you. Look. Listen to me. Listen to me. Stop. Stop. Stop. Listen.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

Struggling.

CR: Stop.

CB: See look. Like I said, I got a bed right there.

CR: Uh. *Breathing heavily.* Uh. No I don't want to be here. _____ let me go now. Please. Just let me go. Please.

CB: I will if you turn around and look at me.

CR: No you won't. Please. Just let me go now. Uh. No.

CB: You keep doing that _____.

CR: No.

CB: Turn around. Turn around. Turn around. Turn around. Turn around.

CR: Stop.

Struggling.

CR: Uh. Quit. Let me go.

CB: No.

CR: Let me go. Don't. Uh. Uh. Stop it. I don't want to. No.

CB: Will you.

CR: I don't want to go in there.

CB: You're not going in here. Come here. Come here.

CR: What?

CB: Come here.

CR: What?

CB: Come here.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CR: No. No. *Struggling.* No.

Music in background.

CB: Stop.

CR: Well then let me go. Just let me go.

CR: I just don't. I just don't want to any more.

CB: Have a cigarette before we go?

CR: Yeah.

CB: Are you sure that's okay?

CR: Yeah.

CR: What are you doing?

CB: Smoking and texting. What does it matter to you?

CR: Because I have to give you this ride.

CB: _____

CR: My time. You hurt my wrist.

CB: I'm sorry, I didn't mean to. You're the one who's being a _.

CR: No, I just don't want to do that.

CB: See. _____. What's up.

Scratchy sound.

CR: Yeah. _____.

CB: I want you to know I'm gonna finger your pussy while you're driving.

CR: That is not okay.

CB: It will be.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CR: No it won't.

CB: _____

CR: If you do that, you're getting out.

CR: No I just don't want to do that any more.

CB: Oh you just don't want to do it with me any more.

CR: Yeah, that's basically what I'm saying. I'm trying to end this and you don't want to end it.

CB: It's not gonna end until I say so.

Beeping sound in background.

CR: If I refuse to see you, what are you gonna do?

CB: Ha ha ha. You really want to know the answer to that?

CR: Yeah, because I think I have a right to do what I want to do with my self.

CB: I don't think so.

CR: What? So how am I supposed to get rid of you?

CB: Have sex with me one more time.

CR: No. I don't want to.

CB: Well, that's the only way.

CR: What? Why, why is that the only way?

CB: That's the only way.

CR: But I don't want to do that.

CB: That's the only way you gonna be rid of me. You want to be rid of me permanently?

CR: Yeah.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: Then have sex with me one more time.

CR: No.

CB: Well. Well let me have sex with you one more time.

CR: What does that mean?

CB: _____

CR: No.

CB: Meaning that we're gonna fuck for hours until we can't fuck no more, and then we'll be done. That's closure right there.

CR: I don't need closure.

CB: I do.

CR: Why?

CB: Cuz I said I do.

CR: Oh. Oh. Angry.

CB: _____ ain't going nowhere cuz I already told you that's the way you're gonna get rid of me. You gotta worry about me kissing on your neck any more. You gotta worry sucking your titties no more. You don't worry no more about me eating your pussy.

CR: I don't w ant you to do that while I'm driving.

CB: Eat your pussy while you're driving.

CR: No. There's just no room for that.

CB: Watch me make room.

CR: What?

CB: Watch me make.

CR: I will stop. I'm not kidding. _____ No.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: _____ one more time?

CR: No.

CB: _____ well I guess I'll be in your life forever. I'll show up at your house and everything while your mom home and all.

CR: My mom doesn't want you there.

CB: You don't even know.

CR: I told her.

CB: You told her what?

CB: You know what. I'm going to fuck you now. Do not _____ number on you. Do you hear me? Again. You don't want me to say nothing _____. Come on. _____ cuz you know, when we fuck, when we have sex. _____

CR: No.

CB: Why.

CR: I don't want to do that.

CB: Well you're gonna do that. I'm not taking no for an answer, in case you haven't figured that out. I never do. Because actually the camper shit I just wanted to show you like, you know, the little area. I wasn't trying to fucking have sex with you. Cuz number one that's not cool enough to have sex in.

Rap music in background.

CR: No. I don't want you to do that. I don't want you to.

CB: Get you all hot for it.

CR: No.

CB: Be honest about it. Get you all wet?

CR: No.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: Horny?

CR: No.

CB: No? Huh?

CR: It's _____

CB: _____

CR: What?

CB: _____ Well we gonna fuck one last time. I already told you that I'm not taking no for an answer.

CR: You're not taking no for an answer.

CB: Mmhuh.

CR: You can't do that.

CB: Yeah I can.

CR: No you can not.

CB: Either that or I be in your life forever.

CR: No.

CB: Wouldn't it be simpler just to be like okay, fine let's get it done and over with. Don't worry about it no more.

CR: No because I don't want to do that any more.

CB: Really. So you're telling me you would rather put up with me, have me in your life still instead of just like you know.

CR: No, you're not gonna be in my life.

CB: Wanna bet?

CR: Why would you still be in my life?

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: Well soon as we have sex one last time. I'll always be around. But it would be simpler to just be like okay fine, get it done and over with.

CR: No I won't. I don't feel comfortable any more.

CB: What do you mean, you don't feel comfortable any more?

CR: Sure hope _____

CB: _____

CR: You know I think you should be, be happy for what we had and then…

CB: No. No.

CR: …that's it, bye.

CB: No. One last time ain't gonna kill you. May make you walk funny a little bit, but it ain't gonna kill you.

CR: I don't want to.

CB: Well. You either let _____ or I can just bug you for the rest of your life.

CR: No. That's harassment.

CB: That's not harassment.

CR: That is harassment if I don't want you to bug me and you bug me.

CB: Prove it.

CR: Prove what?

CB: That it's harassment.

CR: It is harassment. That's a common known harassment. I've asked you to leave me alone forever and you won't.

CR: What?

CB: Mmhuh.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CR: Whatever happened to Jade? Why didn't you just like stay with her?

CB: She turned out to be crazy.

CR: Well I'm crazy too.

CB: The sex is good.

CR: Oh come on, leave me. I'm crazy.

CB: The sex was good.

CR: Do you want me to crash my car to prove it?

CB: Go right ahead. It's your insurance.

CR: Well I'll crash it on your side of course.

CB: Got air bag.

CR: No it doesn't. Have one in the front, not on the side.

CB: Well, you got insurance, right, you'll be paying all the medical bills then I'll just sue your ass.

CR: Well at least I won't have to have sex with you.

CB: Oh you still have to have sex with me. Either that or.

CR: Not when you're injured.

CB: Either that or find other way, make sure you get taken care of.

CR: What?

CB: Yeah.

CR: Find other ways?

CB: Mmhuh. You're not gonna win this, so you might as well give up.

CR: Are you threatening me?

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: No.

CR: Well that sounds like a threat to me. I don't want to do something and you're.

CB: Who's threatening you?

CR: You're saying that.

CB: You just threatened me how about you gonna freaking crash the car on my side.

CR: Well that's because I feel desperate. I don't want to have sex with you and you're asking me to.

CB: Well you are gonna have sex with me. I ain't asking you, I'm telling you. You want to be done with me, that's, that's, that's the agreement. You want to be done with me? That's the agreement. Then you are out. The slate will be wiped clean. You won't ever have to see me ever again.

CR: I will not do that consensually.

(Rustling sound).

CB: _____ my dick in there, one last time. And I guarantee you I'm doing it. You always enjoyed sex with me didn't you? Huh?

CR: Just because I enjoyed it before doesn't mean I want to do it again.

CB: It was just a couple days ago we did it. *Laughs.*

CR: It doesn't matter. Things change. Girls should never be made to do something like that, even if they were doing it before.

CB: Well, I gave your options ma'am, what you choose with it is up to you.

CR: What's my options?

CB: You already know what your options are.

CR: You're going to continue to bother me?

CB: Mmhuh. *(Affirmative).* What you gonna tell your mom, he won't leave me alone. Or ___ _____. *(Raises voice)* Keeps bothering me, he's bothering me. Like I said, that shit won't

work. Soon as you go to the cops, the day you go you know I know about it. You'd be surprised how I find out things. You're not gonna say anything? I hate it when you just get silent.

CR: What do you want me to say? Do you want me to argue with your something?

CB: It's not about arguing with me.

CR: You want me to agree to do what you asked?

CB: Mmhuh, right. Hello? Jump in here with some feedback any time now.

CR: I can't agree.

CB: You can't agree?

CR: I can't agree to that.

CB: Why not?

CR: Cuz I have rights. And I have a right to say no.

CB: Oh now you're acting like it's fucking rape. Seriously? So that's the way it's gonna be now?

CR: What do you mean?

CB: You know exactly what I mean. That's the way it's gonna be?

CR: I'm not gonna have sex with you.

CB: Okay. Your choice. You sure? Cuz I can become real annoying. And so what, you gonna get what, a harassment order? What the fuck is a piece of paper? Really. Is that what you was thinking next, just go to the courthouse tell them I'll keep harassing you and, you know, _____ Hello?

CR: Why can't I do that?

CB: Huh? No, I'm saying, was that, that what you was thinking?

CR: No I'm just.

CB: No, I'm saying, is that what you was.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CR: I just want you to leave me alone.

CB: No, I'm saying is that what you was thinking?

CR: No. I'm just.

CB: _____

CR: Don't want a relationship any more. All I'm thinking. I want you to leave me alone.

CB: Well you know how to fucking do that. Grow the fuck up. Get a backbone. Like I said, so what. You go to the courthouse, get a piece of fucking paper. What the hell's that supposed to mean? Nothing. It means nothing sweetheart. Like I say, I have witnesses already, on speed dial mind you, that's ready to say otherwise. And then turn around, I probably could even do a suit against you for slander. So you know. And I'll win that one. Because like the other attorney I have now, it's not a public defender. She's a private attorney. She's pretty fucking good. Lost me about fifteen hundred bucks but he's pretty good. So. I would strongly urge you to think about your actions. See? See how you put me here? I don't like that. I don't like to be in this type of situation, you know what I mean?

CR: What type of situation?

CB: That situation. To where I have to, you know, be irrational to prove a point. And I'm starting to really get pissed off just thinking about it. Christina, Christina, Christina. You just don't learn. Bad. There's a old saying uh, a beaten dog may fear you but you turn your back motherfucker will strike. And like so many other people have learned, when it comes to dealing with me, just like the person who killed my cousin learned. When it comes to dealing with fucking with my family, revenge is best served cold.

CR: Why are you gonna get revenge on me just because I don't want to have sex with you?

CB: Who said I would get revenge on you? I was just explaining some things.

CR: I haven't done anything.

CB: Hm. Like I said, revenge is best served cold. I'm taking my shit straight outta the fucking freezer. Just you uh, when you start running your mouth to your mom again, for every action there is a reaction. Is that clear?

CR: Yeah.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CB: But. Yeah, I do have love for you and I do care for you. I'm gonna tell you what I'm gonna do. Because you are a pretty good friend, I consider you a damn good friend. Considered you good ass girlfriend too until now. _____

CB: No. I'm just letting you know what I am capable of doing. I mean not saying I would ever do anything. Like I said. Don't underestimate people, you know it turns out bad. Very bad. Underestimating me is something that would not be smart. Comprende?

CR: Yeah.

CB: I love you enough to kill you.

CR: _____ You what?

CB: Love you enough to kill you.

CR: To kill me?

CB: Mmhuh. *(Affirmative).*

CR: What does that mean?

CB: If I can't have you, nobody can. You are going very slow. That damn car just illegally went around you.

CR: I _____ going 55.

CB: Yeah.

CR: My fault.

CB: I love you enough to kill you.

CR: Don't say that.

CB: Rather me lie?

CR: I don't understand what you mean by that. Is that a threat?

CB: No. I don't make threats.

CR: Well what do you mean?

CB: I love you enough to kill you. If I can't have you nobody can. If I find out you talked to somebody that motherfucker's dead too.

CR: About what?

CB: About anything. If I find out you having sex with somebody, male or female, that motherfucker's dead too. I might just kill your cat, just for fun. Don't have to skin him. *Laughs.* I'm just joking, God, you know, loosen the fuck up. Tina, loosen up. Loosen up. Loosen up, loosen up. Loosen up. Loosen up, babe. Okay? Christina. Loosen up, baby, loosen up on the steering wheel. Loosen up, relax, relax, relax. Relax baby, all right? Relax.

Rustling.

CB: _____

Rustling.

CR: No.

CB: Yeah.

CR: No.

CB: _____

Rustling.

CR: Uh. Uh. *Gasping.* No. No. Uh. Uh. Uh. Uh. Uh. Stop. Uh. Uh. Uh. Stop.

CB: *Laughs.* Wrestlemania.

CR: Uh. Uh. No. Stop. Uh. Uh. I don't want to. Uh. Uh. No. No.

CB: Is this what you really want?

CR: Uh. Stop. Uh. Stop. Stop.

CB: I'm just making sure.

CR: Stop. I don't want to.

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

Rustling.

CR: Stop. Uh. No. I don't want to. Uh. _____

CB: _____

CR: What? Uh. No. Uh. Uh. Uh. Uh. *Gasping. Ow. Whimpering.* No.

CB: Will you calm down.

CR: I don't want to do it any more. Ow. Stop. Uh. Uh. *Gasping and whimpering.*

CB: Seriously dude. You don't want it any more?

CR: No. Uh. No. Uh. Uh.

CB: You don't want it any more?

CR: No. Ow, I don't want to do this.

CB: Why?

CR: Because, I just don't.

CB: Why?

CR: I don't have to have a reason.

CB: Yeah you do.

CR: No I don't. No. Uh. Uh. Uh. Ow. Uh. Uh. Uh. *Crying out.*

CB: Chris.

CR: *Breathing heavily.*

CB: Why you acting like that?

CR: I told you I didn't want to do that.

CB: Look at me. Look at me. You really really know how to kill a brother. Not funny. Come here. Come here. So you really don't want me to do it?

CR: No, I don't want you to do that.

End of recording.

(4/23/12, so)

I certify under penalty of perjury that the forgoing is true and correct. Written and signed in Clallam County.

Deputy: _____ Date: _____

Supervisor: _____ Date: _____

CLALLAM COUNTY PROSECUTOR

June 06, 2013 - 3:24 PM

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